No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE CHESTER COUNTY HISTORIC PRESERVATION NETWORK IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Establishment Clause of the First Amendment require that the Texas State Preservation Board remove a Monument containing the Ten Commandments from government property that has been designated as a National Historic Landmark?

Suggested Answer: No.

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I. STATEMENT OF IDENTITY AND INTEREST OF AMICUS[1]

The Chester County Historic Preservation Network ("CCHPN") is a Pennsylvania non-profit corporation formed for the purpose of protecting and educating the public regarding historic and cultural resources within Chester County, Pennsylvania and its environs. Its stewardship tasks include the preservation of buildings, structures, sites, objects and landscape features for the benefit of present and future generations.

The CCHPN is interested in the outcome of this litigation as a result of its participation (also as an Amicus Curiae) in recent litigation seeking the removal of a "Ten Commandments" plaque affixed to the Chester County Courthouse in 1920.[2] The CCHPN believes that the argument advanced by the petitioner in this case – which is essentially the same as that advanced in the Chester County case – presents a radical challenge to the way decisions are now made regarding the historic preservation of buildings, monuments, and other objects. Because historical preservation is central to the CCHPN's mission and because the litigants in this case may not be motivated by the same interest in and concern about historic preservation, the CCHPN Board has authorized the filing of this Brief.

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[1] As reflected in letters filed with the Clerk, the parties have consented to the filing of this brief. The CCHPN and its counsel are the only authors of this brief; no other person or entity contributed to the preparation or submission of this brief in any way.

[2] *See Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003). Both the Chester County Courthouse and the Texas State Capitol grounds were listed on the National Register of Historic Places after the monuments at issue were built. The Texas State Capitol grounds has since achieved the higher historic "landmark" designation.

II. STATEMENT OF THE CASE

In 1961, the Fraternal Order of Eagles ("the FOE")[3] announced its intention to donate a monument "to the people and youth of Texas." The FOE's enthusiasm for monument building was not confined to Texas, however. Indeed, during the 1950s and early 1960s, it erected a series of similar monuments elsewhere in the United States as a part of its national campaign against what was then called "juvenile delinquency." The FOE program was originally inspired by E.J. Ruegemer, a judge in juvenile and probate court in St. Cloud, Minnesota. In a 1946 case, Judge Ruegemer was confronted with a 16 year-old who had stolen a car and struck and injured a passing priest. It turned out that the boy had grown up in a troubled home and had struggled with problems with his hearing and vision. So, instead of sending the boy to the Red Wing Reformatory, the judge sentenced the young man to learn and live by the Ten Commandments. He then got him a job. Warren Wolfe, *Monumental Showdown has St. Cloud roots; A Minnesota judge planted seeds for battles over the Commandments in 1946,* Minneapolis Star Tribune, August 30, 2003. According to a tribute to Judge Ruegemer, who went on to serve as a District Court judge, the youth was never in trouble again. *Commanding*

[3] The Fraternal Order of Eagles – founded in 1898 and originally comprised of actors and stage hands – is perhaps best known as the original proponent of Mother's Day. Yet its self-described history refers to many other accomplishments: "a Workman's Compensation Act, Mothers and Old Age pensions, Social Security laws and Jobs After 40. The modern day FOE is still fighting to liberalize present social benefits along with combating vicious diseases plaguing mankind through their sponsorship of the Art Ehrmann Cancer Fund, Max Bear Heart Fund, Jimmy Durante Children's Fund, "Doc" Dunlap Kidney Fund and the Diabetes Fund." http://www.foe.com/history/history.html. Theodore Roosevelt, Warren G. Harding, Franklin D. Roosevelt, Harry S. Truman, John F. Kennedy, Jimmy Carter and Ronald Reagan are listed as FOE members. *Id.*

Presence, Eagle Magazine 7 (March 2002) (published in honor of Judge Ruegemer's 100th birthday).

The FOE made the Ten Commandments part of its National Youth Guidance Program only after representatives of various Jewish, Catholic, and Protestant organizations had concurred on a rendition of the Commandments that could be considered "non-sectarian." *Books v. City of Elkhart,* 235 F.3d 292, 294 (7th Cir. 2000). Originally, the FOE had planned to distribute only paper copies of the Ten Commandments, but Cecil B. DeMille, sensing an opportunity to combine the project with promotion of his movie of the same name, suggested that something more permanent be used. Jess Bravin, *Commandments on Trial,* Chicago Sun-Times, April 24, 2001 at 6. Ultimately, Paramount Pictures provided the FOE with photographs of the prop used in DeMille's movie, and it was used as the model for the engravings on the monuments that were distributed throughout the United States. *Id.* Several of the monuments were dedicated by the stars of the movie, Charlton Heston, Yul Brenner, and Martha Scott. *Id.* When it was initiated, the FOE campaign received praise from then-President Harry S. Truman and then-FBI Director J. Edgar Hoover. Eagle, at 7.

This nationwide "juvenile delinquency" campaign came to Texas rather late in its lifespan, when the Texas Legislature, as a means of honoring the FOE's work in that field, approved the proposed donation by resolution in 1961. The monument was duly erected on government property approximately 75 feet from the state Capitol building. There is no evidence that the FOE's donation, the juvenile delinquency campaign, or the monument itself was the subject of any controversy in 1961.

There are several other monuments on the grounds of the Capitol. These include monuments commemorating the heroes of the Alamo, volunteer firemen, Confederate soldiers, Terry's Texas Rangers, Hood's Texas Brigade, the Texas cowboy, veterans of the Spanish-American war ("The

Hiker"), veterans of the 36th Infantry, disabled veterans, World War I, Pearl Harbor, Texas pioneer women, Texas children, Korean War veterans and Texas peace officers. There is also a Statue of Liberty replica (donated by the Boy Scouts of America). Each of these monuments has its own history. Each was promoted by some group interested in honoring someone or something. Each, at some point before its construction, received an approval from someone in authority in the State of Texas.

In 1970, the Capitol and its approximately 20 acres of surrounding land was listed on the National Register of Historic Places. *See* National Register Information System, found at http://www.nr.nps.gov/nrloc1.htm. In 1986, the same property was declared a National Historic Landmark. *See* State Preservation Board, found at http://www.tspb.state.tx.us/spb/capitol/texcap.htm. The parties have stipulated that the National Historic Landmark includes the "Capitol, together with its grounds and the monuments erected and maintained there." *Van Orden v. Perry*, 351 F.3d 173,175 n.1 (5th Cir. 2003). They have also stipulated that "the Ten Commandments monument is an element of a legally-protected National Historic Landmark." *Id.*

In 1983, the Texas Capitol caught fire, with near disastrous result. In response, Texas established a State Preservation Board and appointed a curator whose qualifications and duties are defined by statute. *See* Tex. Gov't Code § 443.006. The Capitol and its grounds are among the properties subject to preservation by the Preservation Board and its curator. The others include the Capitol Extension, the 1857 General Land Office Building and certain other designated buildings together with their contents and their grounds. http://www.tspb.state.tx.us. The Board also operates the Bob Bullock Texas State History Museum. *Id.*

For forty years, and despite the numerous visitors who tour the Capitol and its grounds each year, the FOE

monument was but one of the many artifacts that signified different contributions to the state's history and culture. In 2001, however, a Texas resident named Thomas Van Orden took offense at the depictions on the FOE monument and asked the State Preservation Board to remove it, because, he said, "Texas [had] 'accepted' the monument 'for the purpose of promoting the Commandments as a personal code of conduct for youths and because the Commandments are a sectarian religious code.'" 351 F.3d at 176. When the State Preservation Board denied his request to remove one of the monuments on the Capitol grounds,[4] Mr. Van Orden brought suit in the United States District Court for the Western District of Texas. When the District Court found against him, he appealed to the Fifth Circuit Court of Appeals, which affirmed the judgment of the District Court. He has now sought relief from this Court.

III. SUMMARY OF ARGUMENT

The CCHPN believes that this case is about historic preservation, not present-day evangelism. It recognizes that the litigants and their many Amici in this and other similar cases do not see it the same way, but the CCHPN suggests that they are carrying an ongoing argument that arose in an entirely different context into a field where it has no place and, worse, has the potential to do great harm.

The Defendants in this case are the members of the Texas State Preservation Board. The conduct at issue is the decision not to alter an existing historic landmark. Throughout this country, preservationists use public funds to maintain all kinds of buildings, monuments, and other objects, often on public property. Many of those were created by religious people and some were intended to

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[4] Texas law contemplates removal of a monument where it is deemed "unused surplus property that is not of significance," in which case it can be transferred, sold, or otherwise disposed of. Tex. Gov't Code § 443.006. Otherwise, a monument may be removed or relocated permanently only if it is "relocated to a prominent location." Tex. Gov't Code § 2166.5011.

convey a religious message. That is to be expected given the history of this country and its people.

Were this Court to accept the false assumption that lies at the heart of Petitioner's case – that "preservation" is a form of "endorsement" – it will ultimately need to choose between allowing preservation dollars to be spent "endorsing" religious messages or requiring preservationists to weed out history that is arguably religious and maintain only that which is safely secular. Present-day preservationists do neither. Nor do they wish to. For these reasons, the CCHPN asks the Court not to accept a false assumption that leads to a false choice.

IV. ARGUMENT

The question Mr. Van Orden has presented to the Court is artfully phrased. He asks the Court "[w]hether a large monument" on government property in Austin, Texas "is an impermissible establishment of religion in violation of the First Amendment." His focus, in other words, is on *the monument*, and whether *it* should be held to violate the First Amendment.

A monument, however, is an inanimate object. It cannot, by itself, violate the First Amendment because the First Amendment imposes no restriction on inanimate objects. To the contrary, the First Amendment imposes restrictions on certain government actions. In the present case, of course, the restriction at issue is the command that the government "make no law respecting an establishment of religion." U.S. Const. amend. I. To make out an "impermissible establishment of religion," in other words, Mr. Van Orden needs to identify a state actor who has "made a law" that violates the Establishment Clause. A monument – which cannot make a law – is in no position to do that on its own.

Once we turn our attention to specific state action, however, a problem arises. Indeed, it is this problem that

Mr. Van Orden and his Amici seek to avoid by talking about the monument rather than what the government did or did not do. By focusing on the monument, Petitioner attempts to conflate two different state actions taken at different times by different state actors. The first state action was the 1961 decision by the Texas legislature to accept the FOE's donation of the monument and the consequent construction of the monument on the Capitol grounds. The second state action, such as it was, was the 2001 decision by the Texas State Preservation Board to reject Mr. Van Orden's demand that it dismantle and remove the monument. By casting the issue solely in terms of the monument itself, Petitioner hopes the Court will accept his unspoken assumption that these two different decisions made at different times by different state actors are, for all practical purposes, a single decision or "law respecting an establishment of religion." It is a false assumption.

A. A Decision to Preserve a Monument is Not the Same as a Decision to Build a Monument.

The fundamental error in Petitioner's argument is his failure to distinguish between the preservation of an object and the original creation of that object. In the real world, a decision to preserve is different in kind than a decision to build.

To see the difference, let us consider how a southern city with a racially mixed population might react to a monument honoring Nathan Bedford Forrest. General Forrest was one of the most gifted and courageous of Confederate cavalrymen. He was adored by his men and, in the decades immediately after the Civil War, was regarded as a great hero in states where he had tenaciously resisted Sherman's advancing army. Before he became a general, however, Forrest was a slave-trader. Some historians also hold him responsible for the massacre of the predominantly black garrison at Fort Pillow after his Army recaptured that

fortress in April of 1864. And, after the war, he was one of the founders of the Klu Klux Klan.

How would a city council in a modern southern city react to a proposal to build a monument to General Forrest? It seems safe to assume that a project of that kind would attract some heated opposition. Surely, opponents would argue that General Forrest is *not* the kind of man their city should want to "honor" with a new monument. His values are *not* our values. We do *not* consider him to be a role model for our youth. To many citizens, a decision to erect the proposed monument would not only be inappropriate, it would be offensive. And it is hard to see how proponents of such a scheme could expect to carry it off.[5]

But now let us suppose, instead, that the Forrest monument is already there. Say it was erected a century ago by veterans of Forrest's Army and has been a significant landmark in town ever since. What does a modern city council do when approached by a committee of community activists who want the monument torn down? Well, that is a very different question than the hypothetical proposal to build a new memorial. By voting to leave the old monument alone, the typical city councilman does not see himself as "honoring" General Forrest or somehow endorsing General Forrest's racial views. To the contrary, he sees himself as preserving a city landmark of some historical interest and, perhaps, as remembering and respecting the perspective of the civil war veterans who built the monument – whether or not he himself shares that perspective. And perhaps he also worries that a vote to "dishonor" General Forrest will be perceived by some of his constituents as every bit as offensive as a vote to "honor" General Forrest would be

[5] Which doesn't mean they wouldn't try. In October of 2000, Forrest admirers dedicated a new memorial to him in Selma, Alabama. They were met with a political firestorm of opposition, and the mayor and city council of Selma ultimately voted to force the removal of the memorial to a different site. *See Nation in Brief,* The Atlanta Constitution, February 27, 2001, at 9A.

perceived by others. A vote to do nothing may well be the least offensive choice.[6]

It is entirely true, of course, that monuments honoring General Forrest have nothing to do with the Establishment Clause. The point, for the moment, is merely that the decision to build something is *not* the same as the decision to preserve it. They are different in kind. That having been said, however, there is no reason to think that the distinction between creating and preserving would cease to exist if we were to introduce "religion" into the hypothetical.

Suppose, for instance, that Petitioner were to file suit demanding that the words "In God We Trust" be removed from United States coinage? It is possible, perhaps, that he might find a judge willing to order the mint to delete that phrase from all our coins starting in 2005. But what are his chances of finding a judge willing to order the recall of all United States coins minted since the Civil War, when the motto was first added to the coins? Even if we concede that Petitioner finds the old coins to be just as offensive as brand new coins, and even though it is undeniable that the old coins will keep turning up in his change for the rest of his life, his "recall" case is simply different in kind than his "mint no more" case. After all, when the government mints a new coin saying "In God We Trust," it is at least *arguably* saying something about God. But when it declines to destroy old coins, it isn't saying anything at all. It is saving itself

[6] And so it has proved in Memphis, Tennessee, where there is a bronze statue of General Forrest on horseback on Union Avenue, not far from the General's grave. That monument was erected in 1901 by veterans of the Army of Tennessee. In the late 1980s and early 1990s, a group of community activists began a campaign to remove the monument on the ground that it honored a racist. The campaign continued for several years but was unable to garner any significant political support and the statue still stands where it always has in "Forrest Park." *See* Duane W. Gang, *Forrest Descendant Defends Legendary Civil War General,* Chattanooga Times Free Press, August 23, 2000, at A2; Michael Riley, *Nixing Dixie,* Time, August 2, 1993, at 30.

time and money. And it is avoiding chaos in the numismatic market.[7]

It is a version of this latter case, of course, that is presented here. The defendants in this case – all members of the Texas State Preservation Board – were never asked to erect a monument or marker containing the Ten Commandments. They are not in that business. The monument to which Petitioner takes offense is not of their making. They neither chose nor approved the inscription. They have never been asked to "endorse" it. What they were asked to do was to *remove* it. And *that* is what they declined to do. It follows that it is their decision *not* to remove the monument that is at issue in this case. That – not the original decision to put the monument where it is – is the government decision that Petitioner refused to accept when he brought this case. If the defendants here acted unconstitutionally, they did so merely by declining to accede to Petitioner's demand that they make a change in a National Historic Landmark.

B. A Decision Not to Disturb an Existing Object Does Not Constitute an "Endorsement" of the Original Message the Object's Creators Wished to Convey.

In fairness to Petitioner, he does not appear to disagree with the above. He sued the members of the State Preservation Board because he genuinely believes that their decision to preserve an object is for all practical purposes an adoption of the intentions of its creator. Petitioner believes, in other words, that "preservation" is

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[7] To complete the analogy, it might also come as no surprise if the Chester County Numismatic Society – for reasons having nothing to do with the religious views of its members – expressed alarm about the consequences of a hypothetical "recall" case while having no view at all about a hypothetical "mint no more" case. Coin collectors can and do value old coins without forming any moral judgment about what is on them.

essentially a form of "endorsement." Which may be why he and his Amici are so comfortable conflating the events of 1961 and the events of 2001.

But this perception is also an error. The recognition and presentation of the authenticity of historic items or places is not an endorsement of the messages they contain. Monument-*builders* generally do so out of a desire to convey a message of some kind. They may wish to "honor" a particular leader or "remember" fellow citizens who lost their lives in a given war or accident. Or they may wish to record their support of, or opposition to, some great "cause" of their time. In contrast, the motive behind a decision to preserve a monument is a recognition of the causes that provoked such passion at that earlier time or by those earlier persons. It is possible to decide to preserve a monument without either "approving" or "disapproving" whatever its creators had in mind when they created it.

In fact, the statutory framework governing the State Preservation Board demonstrates that the intention of the State of Texas *today* is to present to its residents and visitors an accurate depiction of its history, whether quirky or mainstream, politically correct or not. For instance, the monuments it preserves include a monument to Hood's Texas Brigade, even though very few Texans still support the cause for which General Hood's men fought so bravely. In other words, the values that animate the Preservation Board – to respect a judgment made by persons of another era that something was meaningful *to them* – is not the same as an independent evaluation and endorsement of that meaning today.

Sometimes, however, this distinction is lost – particularly when passions are running strong. Thus, the organizers of the campaign to tear down General Forrest's statue in Memphis perceived the decision to leave it standing as an "endorsement" of Forrest's racial views. To them, the "preservation" of the old monument seemed just as offensive as the creation of a new monument. And this is

precisely Petitioner's argument here. He perceives the current decision as an ongoing state endorsement of what the monument's creators had in mind when they created it. He cannot separate "preservation" from "creation."

Petitioner is not the only person to feel this way. Indeed, during the pendency of the court proceedings below, another group of community activists was trying to persuade their government to remove "longstanding" religious monuments in the Bamiyan Valley of Afghanistan. In that case, the people who had originally created the offensive works were unquestionably religious people. They had undertaken their work – the carving of two giant Buddhas into the side of a sandstone cliff – for religious reasons and no doubt hoped the statues would evoke the kind of reflection, contemplation, and spiritual growth that images of the Buddha are said to inspire among those who are open to such inspiration. All of that was a long time ago, however, and the people of the Bamiyan Valley haven't been Buddhist for a thousand years. Nevertheless, the Muslim people of the valley had preserved and maintained the great Buddhas that their ancestors had built for centuries – even though their own religion disapproved of the creation and veneration of images of any kind. It seems these otherwise devout Muslims recognized, as Petitioner and his Amici do not, that there is a difference between making religious images and merely preserving images made by one's predecessors.

Early in 2001, however, the "endorsement" argument that Petitioner and his Amici advance here suddenly emerged in the Bamiyan Valley. A small but vocal group of concerned "activists" not only took offense at the sight of the monuments; they wanted to protect others from the same offense. The reasonable observer cannot distinguish, they said, between "preserving" something and "creating" something; when you "preserve" the works of ancestors with whom you now disagree, you necessarily "endorse" those works. The only way to avoid "endorsement," the

argument went, is to remove the monument. Leaving it alone perpetuates – perhaps even "magnifies" – the original wrong.[8] And, sad to say, the black-robed rulers of Afghanistan ultimately bought this argument and ordered the destruction of the giant Buddhas.

Needless to say, this way of thinking is not new. To the contrary, rage against the monuments left b#y others runs through all of history and has infected all sorts of otherwise reasonable people and groups. It was a Christian mob – enraged at the efforts to preserve pagan art and sculpture at the Temple of Serapis (or "Seraphim") in Alexandria – that went on "an iconoclastic rampage" in 391 A.D. and burnt the Temple to the ground. Unfortunately, the Seraphim also served at the time as a kind of annex to the Great Library of Alexandria. But much of what that Library held was no doubt as "offensive" to the mob as the idols in the Temple – so it may be, from their point of view, that no harm was done.[9]

Similarly, it was a political and religious activist named "Blue Dick" Culmer whom Cromwell's government authorized to destroy the most beautiful stained glass windows in England on the ground that the "offensive" images depicted in the glass encouraged "superstition" and "Popery."[10] There was no Preservation Board in Cromwell's time, of course, and he probably would not have cared what it had to say even if there had been. Thankfully Cromwell's government didn't last long, but it was long enough for Culmer to get his job done. People like Culmer don't need

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[8] While there is no clear evidence the Taliban considered each day the Buddhas were allowed to stand a magnification of the initial decision, some courts here have. *See, e.g., Books*, 235 F.3d at 303.

[9] While some historians blame the Christians for the destruction of the entire library, see Michael Parenti, *History as Mystery* 96-97 (City Lights Books, San Francisco 1999), others blame Julius Caesar or conquering Muslims. For a balanced discussion of the question, *see* Alexander Stille, *The Future of the Past* 256-60 (Farrar, Straus & Giroux 2002).

[10] *See* Richard Marks, *Stained Glass in England During the Middle Ages* (Univ. of Toronto Press 1993).

much time to do their work – which is one of the reasons preservation so often loses out. The zealot needs only a moment to destroy the past.

Intolerant passion is not confined to religious zealots alone, however. In more recent times, avowedly atheistic governments have been exceptionally diligent in destroying buildings, monuments, and objects that reflect "offensive" social and religious values of earlier governments and times.[11] One might mention, in this regard, the Soviet program of systematic Church destruction in the 1930s, the Red Guards' campaign against "old" culture in China in the 1960s, and the destruction of much of Cambodia's heritage by the Khmer Rouge in the 1970s. Like Petitioner here, all of these people were persuaded that preservation of the past must be equated with an endorsement of that past. Because they did not agree with the ways of their ancestors, they thought it important to destroy their works. They could not reconcile their present views with the preservation of objects that reminded them that their ancestors had different views.

Fortunately, this is not the way most Americans think about the past. To the contrary, public and private institutions throughout the United States devote substantial resources not only to preserving buildings and monuments but also to informing and educating the public about those objects, the people who made them, and the times they lived in. Most of those public and private institutions do not accept the proposition that when they decide to preserve an object, they somehow "endorse" the values of its creators.

And – for the most part – those courts that have addressed this question specifically have been able to grasp

[11] As Karen Armstrong points out in her history of fundamentalism, *The Battle for God* 16-17 (Ballantine Books 2000), modern secularism can be "just as ferocious" as some medieval religions were and, ironically, has itself "been an important factor in the rise of militant fundamentalism."

the distinction. Certainly Judge Becker understood it and embraced it in *Freethought Society v. Chester County,* 334 F.3d 247, 261-62 (3d Cir. 2003) although he still felt compelled to consider the case under the "display" analysis that has been developed outside of and without reference to the preservation context. *Id.* at 261-70. Similarly, the Court of Appeals for the Ninth Circuit showed that it understood the distinction in upholding a present day governmental decision to preserve a sacred tribal site. "Defendant's policy does not convey endorsement or approval of the Tribes' religions," the Court held, going on to state what should be obvious to any neutral observer:

> Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole, much like Greece's preservation of the Parthenon, an ancient Greek temple of worship. Similarly, because of the central role of religion in human societies, many historical treasures are or were sites of religious worship. The Establishment Clause does not require governments to ignore the historical value of religious sites. Native American sacred sites of historical value are entitled to the same protection as the many Judeo-Christian religious sites that are protected on the NRHP, including the National Cathedral in Washington, D.C.; the Touro Synagogue, America's oldest standing synagogue, dedicated in 1763; and numerous churches that played a pivotal role in the Civil Rights Movement, including the Sixteenth Street Baptist Church in Birmingham, Alabama.

Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 976 (9th Cir. 2004).[12]

Which is why – Petitioner's protestations to the contrary notwithstanding – no reasonable observer believes that Texas's preservation of the FOE monument means that Texas has taken an official position on, for example, the making of graven images or, for that matter, the keeping of the Sabbath. After all, if Texas is really serious about graven images, what is the Goddess of Liberty – representing Pallas Athena – doing on the top of the Texas Capitol? And how can the FOE monument's putative "instruction" to "remember the Sabbath to keep it holy" be squared with Texas's present-day policy on the Sunday activities of the Dallas Cowboys and their fans? All of which explains why most Americans *do not* accept the view that refusing to remove a monument is identical to "endorsing" what that monument says. To the contrary, most Americans know that it is possible to preserve and respect the works of one's ancestors without endorsing them. It is true the Taliban never understood that. But we are not the Taliban. And the Constitution does not require that we behave as if we were.

[12] Not all Ninth Circuit panels share this perception, however. In *Buono v. Norton*, 371 F.3d 543, 548-50 (9th Cir. 2004), a cross had been placed on federal land in 1934 by the Veterans of Foreign Wars to honor veterans who had died during World War I (as explained in a plaque nearby) and had been designated as a federal war memorial by the United States Congress. In that case, the Court of Appeals concluded that the designation of the cross as a war memorial did indeed "endorse" Christianity. *Id.* at 550. For one reason or other, it seems that some courts cannot tolerate the preservation of crosses as readily as they can accept preservation of other objects. *See, e.g., Gonzales v. North Township of Lake County, Indiana*, 4 F.3d 1412, 1422 (7th Cir. 1993) (specifically disagreeing with the contention that "[t]he longer the cross is displayed in the Park, the more the effect is to memorialize rather than sermonize.")

C. The 1961 Decision to Erect the Monument Is Not Susceptible to Challenge Under Today's First Amendment Jurisprudence.

But what about the 1961 decision to accept the monument in the first place? Can Petitioner try to "get by" the preservation question he presented in 2001 and litigate instead a challenge to what the Texas legislature did forty years ago? Occasionally, courts have seemed to allow plaintiffs to do this, and, in the process, have applied today's law to yesterday's events. This is the wrong analysis, however, for at least three reasons.

First, if this is turned into a case about what the Texas Legislature did in 1961 – as opposed to what the State Preservation Board declined to do in 2001 – then all the rules and policies that prohibit the delayed assertion of state claims come squarely to the fore. If Petitioner – or anyone else for that matter – had a quarrel with what the legislature did in 1961, why wait until now to assert it? The point was not lost on the District Court – *see* 2002 U.S. Dist. LEXIS 26709 at *8-*9, and – once the question is limited to the events of 1961 – neither should it be lost on this Court. As this Court put it in a very different context some sixty years ago:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

In the present case, the inevitable decay of a record over time has given rise to the dispute about whether the "brief" statements located were sufficient to demonstrate a secular purpose or were instead "a sham." *Compare* 351 F.3d at 179 *with* Pet. Br. at 21. In actuality, such facts as the parties have been able to surface evidence only a lack of controversy over a decision that was unremarkable at the time. Nor can the blanks in the record then be filled in today.

Second, even if this Court were to decide it could discern the "true" motivation behind the events of 1961, it would need to decide which of its "precedents" should apply to those events. And, to be blunt, this question is more than a little awkward. The Establishment Clause, to be sure, has been in the Constitution since 1791. But the idea that that clause imposes a Constitutional restriction on a legislature's supposed "endorsement" of a religious text or sentiment is of much more recent vintage. And the fact is that the Texas Legislature of 1961 – whatever its "real" motive was in accepting the donation of the FOE monument – cannot fairly be accused of "making a law respecting the establishment of religion" as those words were understood by this Court in 1961.

It is worth noting, in this regard, that Petitioner has cited only a single case that was decided before 1961: *Everson v. Board of Education,* 330 U.S. 1 (1947). *Lemon v. Kurtzman,* the decision upon which the Fifth Circuit Court of Appeals' decision rested – and which animates almost all of the briefs filed by Petitioner's Amici – was decided in 1971. 403 U.S. 602 (1971) ("*Lemon I*"). And we know that *that* case cannot be applied to government decisions made in 1961, because this Court has already said so. *See Lemon v. Kurtzman*, 411 U.S. 192 (1973) ("*Lemon II*"). The question presented in *Lemon II* was whether *Lemon I* should be applied retroactively. The Court held that it should not. So

we cannot pretend that that question is somehow open.[13] It would seem to follow, then, that if this Court plans to adjudicate a decision made by the Texas legislature in 1961, it will need to consider what it is that made that decision unconstitutional when it was made.

In considering *that* question, it is surely relevant that *no one* in the State of Texas perceived the erection of the monument in 1961 as raising a constitutional question. The dearth of legislative controversy – which the Petitioner cites as evidence of the "sham" and "pretext" in which the legislators engaged – has a much simpler explanation: the understanding of the First Amendment in 1961 was not what it is today, and no one thought that the receipt of a monument depicting the Ten Commandments on its face would be viewed as an establishment of religion. And that, indeed, is exactly what the cases decided by this Court in 1961 demonstrate.

For instance, while Petitioner argues in his brief that "any law" that imposed the Commandment to keep the Sabbath holy "would unquestionably violate the Establishment Clause," *see* Pet. Br. at 24, the fact is that back in 1961 this Court upheld Sunday closing laws in no less than three different cases. The 1961 understanding of the Establishment Clause is illustrated by Chief Justice Warren's observation in one of those cases:

> We are told that those provisions forbidding certain activities to be conducted within a set distance from a place of public worship are especially devoted to maintaining Sunday as the Sabbath. But because the State wishes to protect those who do worship on

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[13] It should be conceded that much like Petitioners' many Amici, the CCHPN's counsel, Drinker Biddle & Reath LLP, likes to cite *Lemon I* (which it won) rather than *Lemon II* (which it lost). Losing a case, however, does not mean one can pretend it was never decided or that it does not appear in the published decisions of this Court.

> Sunday does not mean that the State means to impose religious worship on all.

Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617, 627 (1961).[14]

Now it might well be both educational and entertaining for this Court to try to imagine itself as the Court of 1961 and to ponder how it might have dealt with a challenge to the resolution of the Texas legislature to accept the FOE monument had anyone thought to make such a challenge. But it is plainly the wrong task in this case. The fact that the 1961 Texas legislature did not violate any Constitutional precept as the Constitution was understood in 1961 is not an argument for applying 1961 laws; it is an argument for not adjudicating 1961 decisions over forty years after they are made.[15]

Third, if this Court were to decide to "skip" the preservation decision and go back to consider the older decision to pass the resolution accepting the FOE donation, it would mean that the Court has accepted the erroneous

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[14] The other cases were *McGowan v. Maryland*, 366 U.S. 420 (1961) and *Braunfeld v. Brown*, 366 U.S. 599 (1961).

[15] This Court wrestles fairly regularly with the rare instances in which it is appropriate to require a state to accord deference to this Court's changed interpretations of what is and is not constitutional. *Compare, e.g., Beard v. Banks*, 124 S. Ct. 2504 (June 24, 2004) (holding that *Mills v. Maryland*, 486 U.S. 367 (1988) may not be applied retroactively to provide relief to a habeas petitioner under the analysis set forth in *Teague v. Lane*, 489 U.S. 288 (1989)) *with Hamling v. United States*, 418 U.S. 87 (1974) (applying the standard of obscenity articulated in *Miller v. California*, 413 U.S. 15 (1973), decided while *Hamling* was on direct review). But the interests in finality and federalism that undergird the Court's reluctance to find exceptions to *Teague* or to apply *Lemon I* retroactively at a minimum counsel against examining the decision made by the State of Texas in 1961 under today's interpretation of the First Amendment.

argument that any decision made about preserving an object necessarily entails "endorsement" of that object and its content. By accepting "proof" of what the Texas Legislature intended in 1961 as probative of what the State Preservation Board was doing in 2001, the Court necessarily reduces preservation itself to a sham – which, of course, is exactly what Petitioner and his Amici say it is.

Contrary to Petitioner's implication, however, Texas's commitment to preservation is anything but pretextual. In fact, it is demonstrably both long-standing and constitutional. At the time when the monument was received, three separate constitutional provisions of the Constitution of 1876 "expressed the obligation of the government to preserve the evidences of Texas' historical heritage."[16] *San Antonio Conservation Society, Inc. v. City of San Antonio*, 455 S.W.2d 743, 746 (Tex. 1970). To achieve tax exempt status in Texas, a charity must not only serve the public good, but assume "to a material extent that which otherwise might become the obligation or duty of the community or state." *Id.* The Texas Supreme Court has found that historic preservation satisfies the requirement. In the process, it recounted some of the preserved sites and what they meant to Texas history:

> Palo Duro Canyon State Scenic Park and the Meridian State Park preserve the prehistoric and Indian eras. Indianola State Historic Park is the site of Spanish and French settlements. Mission San Francisco de los Tejas State Historical Park marks the place of the first Spanish missions established in

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[16] Two of the three sections, those providing for a commissioner of Insurance, Statistics and History (former Art. XVI, sec. 38) and regarding historical records, rolls and documents (former Art. XVI, sec. 45) have since been removed. Art. XVI. Sec. 39 is still a part of the Constitution, however. It provides that the "Legislature may, from time to time, make appropriations for preserving and perpetuating memorials of the history of Texas, by means of monuments, statues, paintings and documents of historical value." *Id.*

> East Texas in 1690. San Jose Mission State and National Historic Site preserves the mission established in 1720 during Spain's great colonial power.

Id. at 747.

If this Court were to ignore preservation as preservation and, instead, go back to evaluate the original decision to build a building or create an object, much of what Texas seeks to preserve will ultimately need to be demolished. Certainly neither the Texas nor the California Spanish missions will survive the new judicial wrecking ball. Those places meet all the criteria Petitioner wishes to establish here; they are overtly and unambiguously religious – in fact, they (unlike the Ten Commandments monument) are facially sectarian. No one has to research scriptural translations to recognize that the missions are exclusively Roman Catholic. And, lest there be any doubt as to what is at issue here, one of Petitioner's Amici has just mounted such an assault on federal efforts to preserve the historic missions of California. *See Doe v. Norton*, 1:04-cv-02089-RJL (D.D.C., Unredacted Complaint filed under Seal Dec. 2, 2004) (challenging the decision of the federal government to bear a portion of the cost – through historic preservation funds – of ensuring the structural integrity and restoring the artwork of California's 21 historic missions).[17] All of which, with all due respect, is the very best reason to evaluate preservation decisions for what they are – preservation decisions – and not to try to apply present day law and prejudices to the original construction or creation of objects long ago.

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[17] As Plaintiffs in that case put it: "By providing federal funds only for the restoration and repair of Catholic missions (and their associated religious artwork and artifacts) and not secular or other non-Catholic sites, artwork, or artifacts, the Act defines eligibility for federal benefits with reference to religion, and is therefore non-neutral both among religions and between religion and non-religion, in violation of the Establishment Clause." Redacted Complaint, ¶ 29.

D. The Constitution Does Not Require That Government Discriminate Against Religion in Making Preservation Decisions.

What Petitioner seeks would impose an additional filter for all preservation decisions, one that excludes religious objects and texts *per se*. This is not only substituting judicial appraisal of historical significance and aesthetic value for that of experts such as the Curator contemplated by the Texas legislature, it is also singling out religion for especial onus. But it is well-settled that religious thoughts and ideas are not constitutionally disfavored. *See Good News Club v. Milford Central School*, 533 U.S. 98, 111 (2001). The Constitution neither demands nor tolerates antipathy toward religion. As Petitioner recognizes, this Court's jurisprudence equally forbids a governmental purpose to "disapprove of religion." Pet. Br. at 20 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987)). Imposing Petitioner's requirement that only secular objects can be worthy of preservation would impose just such unconstitutional governmental disapproval. Recognizing that our heritage has been impacted by diverse ideas, even those that are disturbing, is inherently an objective exercise: it does not opine on how the world should be, but recognizes how certain people or movements or events were and the places and circumstances in which they occurred. Such objectivity is the very essence of the neutrality the Constitution requires and protects.

Now the fact is that this country's history includes the history of religious people, many of them undeniably "sectarian" in one way or another. While the missions in Texas and California are obviously Roman Catholic, Quaker meeting houses and documents in Pennsylvania just as obviously are not. Similarly, the Puritans left Puritan objects and monuments behind them. All these people were who they were. Those who try to preserve their works cannot be expected to edit out the religious parts to

render our forebears more palatable to Petitioner and his Amici.

Moreover, elected leaders voice religious thoughts and ideas all the time. They even do so in public places and on public occasions. The greatest speech ever given by an American president was delivered by Abraham Lincoln upon the inauguration of his second term. His thesis was that the Civil War could only be understood as the judgment of God upon the national sin of slavery. He quoted Genesis 3:19, Matthew 7:1, Matthew 18:7, Hebrews 12:6 and Psalms 19:9.[18] And the whole thing – every word – is engraved on the wall of the Lincoln Memorial. Petitioner may well find the patently religious aspects of this speech to be "offensive." But his countrymen do not. And no judge has yet summoned the courage to order it redacted.

That the government can and does preserve existing buildings, monuments, or markers is a universally accepted proposition. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).[19] Surely it is no surprise that

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[18] For an exhaustive analysis of the religious roots of and the theological argument contained in Lincoln's Second Inaugural, see Ronald C. White, *Lincoln's Greatest Speech: the Second Inaugural* (Simon & Schuster 2002).

[19] The Congressional findings that preface the National Historic Preservation Act begin with these:

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

. . .

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic and energy benefits will be maintained and enriched for future generations of Americans;

16 U.S.C. § 470. On the basis of those findings, Congress developed its preservation policy, to be carried out "in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations." 16 U.S.C. § 470-1. As part of that policy, the National Register of Historic Places was established to register "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering and culture." 16 U.S.C. § 470a(a)(1)(A).

the United States government and state and local governments spend tax dollars every day on the preservation of all sorts of objects. These objects include Bibles, prayer books, totem poles, religious statues, sacred clothing, churches, meeting houses, burial mounds, paintings – and all kinds of inscriptions, markers, plaques and monuments. And the Library of Congress and the Smithsonian Institution are full of "offensive" objects the government works very hard to preserve. And no one thinks that the government acts unconstitutionally by doing what it does. The Constitution does not impose an affirmative duty upon the government to weed out the "religious" works of the past and preserve only those that are religion-free.

Like Texas, most preservationists throughout the country make decisions with a blind eye to religion. Indeed, sometimes historic status can be a burden for a property owner, and that burden – like the benefit – applies to religious properties or property owners as it does for anyone. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997) (unconstitutional to apply a different standard of scrutiny to facially neutral historic district building restrictions); *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (church subject to landmarks law); *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995) (government required to consider religious and cultural significance before declining to register site as historic). History is found where it is found. The Old North Church in Boston is indisputably a "religious" building. It was also recently restored with federal dollars. That was money well spent. And there was nothing unconstitutional about it.

E. The Determination of What is Historically Significant is Not a Decision for the Courts.

But does the FOE monument really have any historic value? It is a fair question. For even if the logic of Petitioner's argument could justify the destruction of the Buddhas of Bamiyan, seventeenth century Spanish missions, Old North Church and the Lincoln Memorial, it is true that Petitioner himself has chosen a less exalted target. The FOE Memorial is not all that "historic." And it isn't even one of a kind.

It does not follow, however, that the Texas State Preservation Board erred when it decided to preserve the monument. Just as Abraham Lincoln is part of our history, so are Judge Ruegemer and Cecil B. DeMille. Markers evidencing twentieth century enthusiasm for the Ten Commandments tell their own stories of their own times. The marker affixed to the Chester County Courthouse in 1920 was part of a campaign by a liberal evangelical organization known as the International Reform Bureau. Led by a former protégé of the great abolitionist preacher Henry Ward Beecher, the IRB was devoted to a number of liberal causes including the adoption of Child Labor Laws, the ratification of the League of Nations Treaty, and a proposed Constitutional Amendment to prohibit the use of public monies in "sectarian" (by which was meant Roman Catholic) schools. Its enthusiasm for the Ten Commandments reflected both its strong Sabbatarian views and its advocacy of universal or "international" law, which, it thought, the Ten Commandments represented.[20]

Judge Ruegemer, Cecil B. DeMille and the FOE campaign come a generation later and reflect a curious mid-century solution for juvenile delinquency. Judge

[20] The record of the IRB was originally proffered to the District Court for the Western District of Pennsylvania in *Modrovich v. Allegheny County*, the decision of which was affirmed by the Third Circuit Court of Appeals at 385 F.3d 397 (3d Cir. 2004). In point of fact, each monument and each plaque on each historic landmark has its own story.

Ruegemer's perception of the problem – using moral suasion and a job to counteract an underprivileged childhood rather than relegating a youth to a Reformatory – reflects the liberal optimism of the 1950s. It is true that the social activism of the IRB and the reformers of the 1950s was often informed by their religious views. As, indeed, was that of notable abolitionists and suffragists in an earlier era. But is it intellectually honest to affirm the social change but deny that its proponents were ever prompted by religious motives? Respectfully, the impulse to eliminate any and all evidence that then might have been different from now is exactly the kind of impulse that a State Preservation Board ought to be resisting.

So is the FOE monument worth preserving? There are really two answers to that question. The first is suggested by Alexander Stille in *The Future of the Past* at 256-60. In discussing the destruction of so many ancient texts at the Great Library of Alexandria – a loss that he puts at forty texts lost for each one saved – Stille doesn't blame Christian or Muslim mobs as much as the copyists trying to preserve the texts. It seems that papyri naturally tend to degrade over time and the copyists had a tendency to copy onto new papyri only those texts that they thought worth preserving. As a result, those they considered less important or useful did not survive. The tragedy is that, in retrospect, the copyists' judgment as to what was not worth preserving almost certainly does not coincide with our own. It seems that what we value changes over time. Perhaps the Texas State Preservation Board knows that. Most preservationists do.

Which brings us to the second answer to the question whether the FOE monument is worth preserving, which, it turns out, is itself a question: Who decides? Petitioner seems to believe that judges decide. And it may be that that answer has a certain appeal to judges, or at least to some of them. But it is not the right answer. It may well be that the preservationists will get the answers wrong from time to time, just as the ancient copyists did. But their bias is a bias

in favor of preservation. It is not a bias for or against any particular religious view. And it is to them – not to the federal judiciary – that our elected representatives have entrusted preservation decisions.

Nor have they unleashed untrained persons to make haphazard decisions without parameters or guidance. The Department of Interior has established extensive criteria that govern federal, state, and local preservation decisions. There are specific instructions for "how to evaluate a property within its historic context," including a long list of "areas of significance."[21] By applying the same criteria to religious buildings, markers, and objects that they apply to non-religious buildings, markers, and objects, preservationists seek to ensure, insofar as is possible, that what future generations view accurately reflects the history it purports to represent.[22] With all due respect, the decision to allocate such determinations to preservationists and curators is the right decision. But even if it were in doubt, it is a decision this Court should respect. The Texas State Preservation Board acted within the authority given to it by the people of Texas.[23] Petitioner has given this Court no good reason to countermand their judgment.

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[21] *See* United States Department of Interior, National Park Service, National Register Bulletin No. 15, "How to Apply the National Register Criteria for Evaluation" at http://www.cr.nps.gov/nr/publications/bulletins/nrb15/.

[22] In the present case, the Capitol grounds were part of the Capitol and the monument part of the grounds when the Capitol was listed on the National Register. As such, it is much like a notch in an old gun butt. One does not "preserve" the gun butt by removing the notch. To the contrary, the notch is part of the history of the gun. Eliminating it does not "restore" the gun, it changes it – for the worse – by eradicating a part of its history. Or that, in any case, is how a preservationist sees the question.

[23] By statute, it is a Curator (whose qualifications and duties are defined by law, *see* Tex. Gov't Code § 443.006) who is vested with the responsibility to acquire and maintain items of historical significance, among them monuments – defined by Texas law as "a marker, memorial, statue, or other commemoration of a person, organization, or event." Tex. Gov't Code § 443.0152.

V. CONCLUSION

The Establishment Clause is not a directive to federal judges to become Red Guards in black robes and root out all evidence of our ancestors' religious thoughts and ideas. In fact, the United States Constitution says nothing at all about which remnants of the past should be kept, and which, if any, discarded. Preserving history has nothing to do with "endorsing" any particular ideology; it is a good in itself. The Fifth Commandment tells us "to honor thy father and thy mother." If the people of Texas wish to keep that commandment – and they do – the Constitution cannot even plausibly be read to stand in their way.

Respectfully submitted,

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